. THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 21

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

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Ex parte GEORGE V. DARAVINGAS, TIMOTHY C. HEITKE and DEAN F. FUNK

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Appeal No. 97-0219
Application No. 08/254,457

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HEARD: February 24, 2000

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Before WINTERS, JOHN D. SMITH and OWENS, Administrative Patent Judges.

WINTERS, Administrative Patent Judge.

DECISION ON APPEAL

This appeal was taken from the examiner's decision rejecting claims 1 through 6, 8 through 15, 17 through 26, 28 and 29, which are the only claims remaining in the application.

A copy of claims 1 and 22 , which are illustrative of the subject matter on appeal, is appended to this decision.

The references relied on by the examiner are:

Egli et al. (Egli)	4,235,934	Nov. 25, 1980
Baker et al. (Baker)	4,837,035	Jun. 06, 1989
Meiji Milk Products Co., Ltd. (Japanese Kokai JP 64-16553)	JP 64-16553	Jan. 20, 1989

The issue presented for review is whether the examiner erred in rejecting all of the appealed claims under 35 U.S.C. § 103 as unpatentable over Japanese Kokai No. 64-16553 in view of Egli and Baker.

On consideration of the record, we reverse the examiner's rejection.

DISCUSSION

The appealed claims relate to (1) a method of making a multicolored yogurt product exhibiting resistance to color migration and intermixing of color; and (2) a multicolored refrigerated yogurt product having a plurality of regions of distinct colors.

The method claims (1 through 6, 8 through 15, 17 through 21) require forming a first horizontally extending yogurt phase at a temperature of 35° to 45° F and a viscosity of about 15,000 to 30,000 cps and, thereafter, adding a second horizontally extending yogurt phase also at a temperature of 35° to 45° F and a viscosity of about 15,000 to 30,000 cps "in direct physical contact" with the first phase to form a yogurt

product having discrete unmixed separately colored yogurt phases. The difference in viscosity between yogurt phases is less than about 3,000 cps. Likewise, the product claims (22 through 26, 28, 29) require a first yogurt phase disposed within a substantially opaque container having a first color and a viscosity from about 15,000 to 30,000 cps at a temperature of about 41° F $\pm$ 3.6°; and a second yogurt phase disposed within the container "in direct physical contact" with the first yogurt phase, where the second phase has a color distinct from the first color, and also has a viscosity from about 15,000 to 30,000 cps at a temperature of about 41° F $\pm$ 3.6°. Again, the difference in viscosity between the first and second yogurt phases is less than 3,000 cps.

Japanese Kokai No. 64-16553 discloses a method for manufacturing a multicolor patterned yogurt where the yogurt thus obtained has a viscosity of at least 1,000 cps at 5° to 20°C. We have reviewed this reference in its entirety, including page 8, Table 1 of the English translation of record, summarizing the results of Practical examples 1 through 6 and Comparative Examples 1 through 8. The highest viscosity set forth in Table 1 and, indeed, in the entire reference, is 4,000 cps at 5°C during packing for Practical Example 3.

The examiner's position to the contrary, notwithstanding, Japanese Kokai No. 64-16553 constitutes insufficient evidence to support a conclusion of obviousness of

claims 1 through 6, 8 through 15, 17 through 26, 28, and 29, containing the above-noted viscosity limitations. Japanese Kokai No. 64-16553 does not disclose or suggest a method of making a multicolored yogurt product exhibiting resistance to color migration and intermixing of color by forming a first yogurt phase at a temperature of 35° to 45° F and a viscosity of about 15,000 to 30,000 cps and, thereafter, adding a second yogurt phase also at a temperature of 35° to 45° F and a viscosity of about 15,000 to 30,000 cps in direct physical contact with the first phase. Nor does Japanese Kokai No. 64-16553 disclose or suggest a multicolored refrigerated yogurt product having a plurality of regions of distinct colors, with a first yogurt phase having a viscosity from about 15,000 to 30,000 cps at a temperature of about 41° F $\pm$ 3.6°; and a second yogurt phase in direct physical contact with the first phase having a viscosity from about 15,000 to 30,000 cps at a temperature of about 41° F $\pm$ 3.6°.

Simply stated, Japanese Kokai No. 64-16553 would not have led a person having ordinary skill from "here to there", i.e., from the disclosed method and product having a relatively low viscosity to the claimed method and product reciting a relatively high viscosity for each yogurt phase. Nor does Egli or Baker cure this deficiency of Japanese Kokai No. 64-16553

The examiner's decision rejecting claims 1 through 6, 8 through 15, 17 through 26, 28 and 29 under 35 U.S.C. § 103 is reversed.

REVERSED

SHERMAN D. WINTERS Administrative Patent Judge	)
JOHN D. SMITH Administrative Patent Judge	) BOARD OF PATENT) APPEALS AND) INTERFERENCES
TERRY J. OWENS Administrative Patent Judge	)

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Appendix A
Claims 1 & 22

1. A method of making a multicolored yogurt product exhibiting resistance to color migration and intermixing of color, comprising the steps in sequence of:

A. preparing a yogurt base comprising:

1. sufficient amounts of milk ingredients to provide a total milk solids concentration of at least 12%, and

2. sufficient amounts of a yogurt thickener blend in an amount effective to provide a viscosity in step H of about 15,000 to 30,000 cps;

B. pasteurizing the yogurt base to form a pasteurized yogurt base;

C. cooling the pasteurized yogurt base to a temperature of 100° to 115° F;

D. inoculating the yogurt base with a yogurt culture to form an inoculated yogurt base;

E. incubating the inoculated yogurt base to form a yogurt;

F. mixing the yogurt to form a stirred yogurt;

G. partitioning the stirred yogurt into a first portion and a second portion;

H. adding a first non-bleeding colorant to the first yogurt portion to form a first colored yogurt phase;

I. charging a quantity of the first colored yogurt to a container at a temperature of 35° to 45° F and a viscosity of about 15,000 to 30,000 cps to form a horizontally extending yogurt phase; and thereafter

J. charging a second quantity of the second yogurt phase to the container at a temperature of 35° to 45° F and a viscosity of about 15,000 to 30,000 cps in direct physical contact with the first colored yogurt to form a yogurt product having discrete unmixed separately colored yogurt phases; and,

wherein the difference in viscosity between yogurt phases is less than about 3,000 cps

wherein the first and second phases are disposed in the container in the form of vertically arranged horizontally extending layers; and

K. maintaining the yogurt product at refrigerated temperatures.

22. A multicolored refrigerated yogurt product having a plurality of regions of distinct colors, comprising:

A. a substantially opaque container;

B. a first yogurt phase disposed within the container having a first color, said first yogurt phase comprising a stirred style yogurt in the form of a horizontally extending first layer including sufficient amounts of a yogurt thickener to provide the first yogurt phase with a viscosity upon being disposed therein ranging from about 15,000 to 30,000 cps at a temperature of about 41°F $\pm$ 3.6°;

C. a second yogurt phase disposed within the container in direct physical contact with the first yogurt phase, said second yogurt phase being in the form of a second overlying horizontally extending layer having a second color distinct from the first color comprising a stirred style yogurt including sufficient amounts of a yogurt thickener to provide the second yogurt phase with a viscosity upon being disposed therein ranging from about 15,000 to 30,000 cps at a temperature of about 41°F $\pm$ 3.6; and

wherein the difference in viscosity between the first and second phase is <3,000 cps.